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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1930

No. 370

J. W. ALFORD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of J. W. Alford for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

The petitioner, J. W. Alford, was indicted on January 3, 1929, by the Grand Jury of the United States in and for the Southern District of California, Central Division. Said indictment charged the defendant with six violations of Section 215 of the criminal code of the United States or, as it is more commonly called, with using the United States mails for the purpose of executing a scheme or artifice to defraud. The indictment is set forth at length from pages 3 to 15 of the transcript of record.

The indictment alleges but one scheme to defraud which scheme is incorporated in toto in each of the six counts. The alleged offenses consisted in mailing six separate letters in furtherance of this one specific scheme.

At the beginning of the trial Count No. 4 was dismissed on motion of the petitioner as being a repetition of Count No. 1 (Trans. pp. 27, 81). During the trial Count No. 3 was dismissed on motion of the United States Attorney (Trans. p. 190).

The petitioner pled not guilty to each of the counts of the indictment and seasonably moved the trial Court for an order directing the Government to furnish him with a bill of particulars, which motion and demand for said bill of particulars is set forth beginning with page 15 of the transcript of record. This motion was by the Court granted in part but otherwise denied by the trial Court. No ground of error is urged herein as to the refusal of the Court to grant any part of the demand and mention of the same is only made herein because the Government, in conforming to the order granting in part the bill of

particulars, limited the charge to certain items and dates (Trans. pp. 21 and 23; infra 29).

Upon such indictment and the bill of particulars as furnished by the Government the cause proceeded to trial before the Honorable William H. Sawtelle and the jury.

One of the main points relied upon by petitioner is that the state of the case and record as it was when the cause was submitted to the jury resulted in the defendant being tried and convicted in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

This point arose due to the fact that the indictment specifies the scheme to defraud to have consisted of twelve major and essential elements. The Court excluded testimony relative to several of these major elements and no evidence proving or tending to prove them was introduced in the case at all. When the cause was submitted to the jury they were authorized to determine the guilt or innocence of defendant upon a scheme or plan to defraud different than that as found and charged by the Grand Jury. This point was raised on the motion for a directed verdict made at the conclusion of the Government's case in chief (Trans. p. 251) and on a similar motion made at the close of all the testimony (Trans. p. 376). It was likewise urged in appellant's motion for a new trial (Trans. p. 403).

During the trial the Government produced as one of its chief witnesses a man named Cameron Bradley, whose testimony, if true, was most damaging to petitioner (Trans. pp. 176-209). On cross-examination

petitioner sought to elicit from this witness his then address and place of residence (Trans. p. 194). The Court sustained objections to this line of inquiry. Petitioner further maintained that he was informed the witness was then in the custody of the Federal authorities and that he had a right to question him upon this in order to show his bias or prejudice (Trans. 198). The trial Court refused to permit such cross-examination on the objections of the Government. The Circuit Court of Appeals, in its majority opinion, holds that these rulings of the trial Court were correct, which holding is in direct conflict with prior decisions of the Supreme Court and of the Circuit Court of Appeals from other than the Ninth Circuit.

The trial Court refused to give an instruction, requested by petitioner, pertinent and necessary to his defense (Requested Instruction 10; Trans. p. 401). The refusal to give this instruction was upheld by the Circuit Court of Appeals, in its majority opinion, which holding is in direct conflict with prior decisions of this Court and of Circuit Courts of Appeal from other than the Ninth Circuit.

The trial Court instructed the jury in such manner as to authorize the jurymen to return a verdict of guilty upon proof of representations made by petitioner and which were not a part of the alleged fraudulent scheme as set forth in the indictment (Trans. p. 401). Contrary to prior decisions of Circuit Courts of Appeal from other than the Ninth Circuit the giving of such an instruction was upheld by the Appellate Court.

The jury found the petitioner guilty as charged in Counts I, II, V and VI of the indictment (Trans. p. 68). Petitioner moved the Court for a new trial which motion was denied (Trans. p. 403). Thereafter petitioner moved in arrest of judgment which motion was denied (Trans. p. 404).

Thereupon the Court made its judgment and sentenced petitioner on the first count of the indictment to imprisonment in the United States Penitentiary for a period of five years and a fine of one thousand dollars. On the second count appellant was sentenced to two years' imprisonment in the same penitentiary and a fine of one thousand dollars. On the fifth and sixth counts appellant was sentenced to imprisonment in the same penitentiary for two years on each of said counts—all sentences of imprisonment to run concurrently (Trans. p. 406).

Petitioner thereafter duly brought and perfected his appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The convictions of judgments appealed from were affirmed, by a divided Court on May 26, 1930. The majority opinion was written by Mr. Justice Wilbur and concurred in by Mr. Justice Rudkin (Trans. pp. 492-503). Mr. Justice Dietrich filed a dissenting opinion (Trans. pp. 503-506).

Thereafter a petition for a rehearing was filed and denied by said United States Circuit Court of Appeals (Trans. p. 507).

Your petitioner, believing that the guaranties of the Fifth Amendment to the Constitution of the

United States have been denied him and that its provisions have been infringed and that the majority opinion of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with prior decisions of this, the Supreme Court and Circuit Courts of Appeal from other Circuits and that such matters, so upheld by the majority opinion, were vital questions going to the rights and bearing upon the guilt or innocence of petitioner, now comes to this high Court seeking a writ of certiorari to the end that justice be done in the premises.

SUMMARY OF GROUNDS RELIED ON FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

It is petitioner's contention:

First, that he was denied the benefits and convicted in violation of the provisions of the Fifth Amendment to the Constitution of the United States in that the action of the lower Court in permitting the cause to go to the jury without proof of certain essential elements of the indictment was in effect an amendment of the indictment. That the majority opinion of the Circuit Court of Appeals upholding such action of the trial Court is contrary to prior decisions of the Supreme Court of the United States and of many other Circuit Courts of Appeal, such as the cases of *Ex parte Bain*, 121 U. S. 1, 30 L. Ed. 849; *Naftzger v. U. S.*, 200 Fed. 494 (C. C. A. 8).

Second, that the majority opinion of the Circuit Court of Appeals relative to the right of petitioner to cross-examine the witness Cameron Bradley is in

direct conflict with prior decisions of the Supreme Court of the United States and of prior decisions rendered by the United States Circuit Courts of Appeal of other circuits, such as the decisions rendered in:

Tla-Koo-Yel-Yee v. U. S., 167 U. S. 274;
The Ottowa v. Stewart, 20 U. S. 165;
Furlong v. U. S., 10 Fed. (2nd) 492 (C. C. A. 8);
Farkas v. U. S., 2 Fed. (20) 644 (C. C. A. 6).

Third, that the majority opinion of the Circuit Court of Appeals in so far as it deals with the refusal of the trial Court to give defendant's requested Instruction No. 10 is in direct conflict with prior decisions on the same point of the Supreme Court of the United States and of Circuit Courts of Appeal of other circuits, such as the cases of:

Byrd v. U. S., 180 U. S. 356;
Calderon v. U. S., 279 Fed. 556 (C. C. C. 5);
Hendry v. U. S., 233 Fed. 5 (C. C. A. 6);
Carney v. U. S., 282 Fed. 398 (C. C. A. 8).

Fourth, that each of the matters passed upon in the majority opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority.

Fifth, that the majority opinion of the Circuit Court of Appeals relative to the instructions as given by the trial Court to the jury is in conflict with the weight of authority.

Sixth, that the dissenting opinion of Mr. Justice Dietrich correctly states the law as found in the prior decisions of this Court and Circuit Courts of Appeal.

For the reasons herein stated petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco,
August 11, 1930.

Respectfully submitted,
THOMAS M. FOLEY,
Attorney for Petitioner.

LEO R. FRIEDMAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioner in the above entitled cause and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
August 11, 1930.

THOMAS M. FOLEY,
Attorney for Petitioner.

In the Supreme Court

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United States

OCTOBER TERM, 1930

No.

J. W. ALFORD,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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1. **PETITIONER WAS CONVICTED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS HEREIN IS IN DIRECT CONFLICT WITH PRIOR DECISIONS FROM OTHER CIRCUITS AND OF THE SUPREME COURT.**

Petitioner contends that, in the United States Courts, a defendant can only be convicted upon the charge contained in the indictment as found by the Grand Jury. No judge or prosecuting officer has

the power to usurp the functions of a Grand Jury or alter, add to or strike from an indictment any material part thereof, either directly or indirectly.

It rests exclusively with the Grand Jury to say for what offense a man be tried and when the Grand Jury has spoken, by the return of an indictment, the man must be convicted, if at all, upon proof of the elements of the offense as the Grand Jury found them.

In the case at bar the grand jury designated, by its indictment, an alleged scheme to defraud consisting of twelve major elements. When the taking of testimony in the case was closed it developed that several of these major and essential elements were unsupported by any evidence at all.

The trial Court and the Circuit Court of Appeals for the Ninth Circuit saw fit to substitute their judgment for that of the Grand Jury and to cull out of the indictment certain allegations as to which there was some evidence, and uphold the conviction upon the theory that such allegations were sufficient to establish a scheme to defraud. But as petitioner was thus convicted upon a scheme different from and consisting of considerably less elements than the scheme as found by the grand jury, he was convicted of an offense with which the grand jury had never charged him and thus convicted contrary to the provisions of the Fifth Amendment to the Constitution.

In order to clearly point out these matters we set forth *in haec verba* the alleged scheme to defraud as found in Count One of the indictment which scheme was by reference incorporated in each of the subsequent counts. We print in italics those portions of

this alleged scheme as to which there was no evidence proving or tending to prove the same.

"The grand jurors for the United States of America, impaneled and sworn in the Southern Division of the Southern District of California and inquiring for the Southern District of California, upon their oath present: That J. W. Alford, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: prior to the several acts of mailing of letters hereinafter alleged, did devise a scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises, from Bessie E. McCluggage, G. R. McNeil, Edith E. Skoog, John R. Gordon, Charles E. Hood and Madolin B. Hoch, and from other persons too numerous to mention, including the public generally, all of said persons being hereinafter referred to in this indictment as the persons to be defrauded:

It was a part of said scheme and artifice that the defendant should and he did engage in business in Los Angeles, California, and in other places in the United States under the fictitious firm name and style of J. W. Alford & Company.

It was further a part of said scheme and artifice that the defendant should and on the 17th day of January, 1927, he did obtain an option to purchase approximately fifty-four sections of land in townships three and four, range three east, in Cimarron County, Oklahoma, which said option provided that the defendant would obtain title to the first sixteen hundred eighty acres of

said land upon the payment of $25,200.00 within thirty-one days from the execution of said option; the option further provided that the defendant could obtain title to the remaining acreage described in said option upon the payment in addition to the said $25,200.00 of an additional $282,000.00.

It was further a part of said scheme and artifice that the defendant would not exercise the option to purchase any of the land hereinbefore described nor to obtain title to any part thereof.

It was further a part of said scheme and artifice that the defendant should and he did, without having title thereto, sell and offer for sale parcels and tracts of land from and out of the tract of land hereinbefore described and to which he had an option as aforesaid.

It was further a part of said scheme and artifice that he should and did pretend and represent to the persons to be defrauded that should the persons to be defrauded pay for the parcels and tracts of land included in the tract hereinbefore described and to which the defendant had an option as aforesaid, that he, the said defendant, would deliver to the persons to be defrauded a grant deed giving them fee title to the land paid for by them as aforesaid, when in truth and in fact the defendant did not intend to and did not in any instance deliver a deed to any of the persons to be defrauded who had paid the said defendant moneys in exchange for parcels and tracts of land included in the tract hereinbefore described and to which the defendant held an option as aforesaid.

It was further a part of said scheme and artifice that the defendant should and did pretend

and represent to the persons to be defrauded that the parcels and tracts purchased by the persons to be defrauded from the said defendant as aforesaid was potential oil land and was land suitable for agricultural purposes.

It was further a part of said scheme and artifice that the defendant should and did pretend and represent to the persons to be defrauded that he, the said defendant, would spend $300,000.00 in drilling oil wells on the tract of land upon which the defendant had an option and from which he was selling tracts and parcels of land to the persons to be defrauded as aforesaid, when in truth and in fact the defendant did not nor did he intend to spend $300,000.00 in drilling oil wells on said tract of land or any other sum nor did he intend to drill an oil well or oil wells on said tract of land.

It was further a part of said scheme and artifice that the defendant should and he did represent to the persons to be defrauded after they had purchased the parcels and tracts of land from the defendant as aforesaid that the prospect for discovering oil in the vicinity of and on the land so purchased by the persons to be defrauded from the said defendant was not what the defendant had expected it to be at the time that he sold parcels and tracts of land to the persons to be defrauded.

It was further a part of said scheme and artifice that the defendant should and he did represent to the persons to be defrauded after they had purchased the parcels and tracts of land from the defendant aforesaid that he, the said defendant, had organized a 'Ten Way To Win Syndicate' for the purpose of protecting the persons to be

defrauded and that he, the said defendant, would give the persons to be defrauded who had purchased tracts and parcels of land from the said defendant as aforesaid interests in the said 'Ten Way To Win Syndicate' in an amount equal to the amount that the persons to be defrauded had invested in the tracts and parcels of land purchased from the said defendant as aforesaid.

It was further a part of said scheme and artifice that the defendant should represent to the persons to be defrauded who had purchased the tracts and parcels of land as aforesaid from the defendant that the 'Ten Way To Win Syndicate' would own ten one thousand acre tracts of land widely separated from each other; that in the center of each tract an oil well would be drilled; that the expense of drilling said wells would be met by selling acreage offsetting the wells to be drilled by the defendant for the 'Ten Way To Win Syndicate' as aforesaid; that the said defendant had secured drillers to drill the said oil wells for the 'Ten Way To Win Syndicate' who had promised not to demand any compensation for their services until the said wells had been drilled to a depth of 1500 feet.

It was further a part of said scheme and artifice that the defendant should not and he did not, nor did he intend to secure any leases of any land for any purpose for the said 'Ten Way To Win Syndicate.'

It was further a part of said scheme and artifice, and in furtherance thereof, that the defendants would unlawfully, fraudulently and knowingly make false pretenses, representations and promises to the said persons to be defrauded, through and by means of divers printed circu-

lars, newspapers, magazines, advertisements, letters and publications in substance and effect as follows:

1. That should the persons to be defrauded purchase a tract or parcel of land from the said defendant in the tract of land hereinbefore described located in Cimarron County, Oklahoma, and should the persons to be defrauded pay the purchase price of said parcel or tract of land so purchased by them that he, the said defendant, would deliver to the said persons to be defrauded a grant deed to said parcels or tracts of land, when in truth and in fact and as the defendant then and there well knew, he would not and could not deliver a grant deed to transfer title to any of the persons to be defrauded or to anyone to any of the land sold by him to the persons to be defrauded.

2. That he, the said defendant, was spending the sum of $300,000.00 in drilling oil wells on the tract of land which the persons to be defrauded had purchased from the defendant located in Cimarron County, Oklahoma, when in truth and in fact and as the defendant then and there well knew, the defendant was not spending nor did he spend the sum of $300,000.00 or any other sum in drilling oil wells on the tract of land aforesaid or any other sum of money nor did he drill or commence to drill any oil wells on said tract of land.

3. That should the persons to be defrauded exchange the land purchased by them from the defendant in Cimarron County, Oklahoma, for interests in an association organized by the defendant and known as the 'Ten Way To Win Syndicate' that they, the persons to be defrauded, would be making a profitable investment, then in

truth and in fact and as the defendant then and there well knew, the persons to be defrauded would not be making a profitable investment.

5. That the defendant would purchase for the 'Ten Way To Win Syndicate' oil leases on ten one thousand acre tracts widely separated from each other, when in truth and in fact and as the defendant then and there well knew, the defendant did not intend to nor did he purchase any tracts of land for any purpose for the 'Ten Way To Win Syndicate.'

6. That the expenses of drilling the wells on the leases to be acquired by the 'Ten Way To Win Syndicate' could be obtained by selling offset acreage to the well to be drilled by the 'Ten Way To Win Syndicate,' when in truth and in fact and as the defendant then and there well knew, the defendant did not intend to nor did he sell any offset or other acreage to drill any oil wells for the 'Ten Way To Win Syndicate' or for any other purpose or at all.

That by means of the aforesaid scheme and artifice to defraud and to obtain money and property from the persons to be defrauded by means of the aforesaid false representations, pretenses and promises the defendant intended to, and did, obtain large sums of money from the persons to be defrauded and intended to and did appropriate and convert to his own use and benefit a large part of the said sums of money, the exact amounts being to the grand jurors unknown." (Here follows allegations as to the mailing of the letters.)

Prior to the trial of the cause the petitioner made a motion for a bill of particulars asking information on

twenty-four separate and distinct grounds (Trans. pp. 15-19). The first and second demand were as follows:

> "1. What said alleged scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises consisted of in its entirety.
>
> "2. What were the false or fraudulent pretenses, representations or promises used by or intended to be used by defendant in said scheme and artifice to obtain money and property" (Trans. p. 16).

The eighteenth demand was as follows:

> "18. When the defendant devised the scheme or artifice set forth in each or all of the counts of the indictment herein" (Trans. p. 18).

The trial Court denied demands one and two and allowed the same as to demand number eighteen. In doing so the Court made the following order:

> "This cause coming before the Court for hearing on the motion of defendant J. W. Alford for a Bill of Particulars; Donald Armstrong, Assistant United States Attorney, appearing as counsel for the plaintiff, and H. H. Harris, Esq., appearing as counsel for the defendant, the motion of defendant J. W. Alford for Bill of Particulars is presented, and the said Donald Armstrong, Esq., having thereupon stated that there are no matters other than the facts and things described in the indictment which he will seek to prove in establishing the charge, either as to the character of the fraudulent scheme, as alleged, or any false representations or pretenses connected therewith; the motion, therefore, is denied as to specifications 1 and 2; specification 6 is denied;

> specifications 10 and 11 are allowed; specification 18 is allowed; specification 19 is denied. Specifications 20, 21 and 23 are allowed, the United States Attorney stating he will furnish same. Specification 24 is denied. No other specifications, set forth in the motion, were presented by the defendant" (Trans. p. 21).

The Government in complying with the Court's order and in answer to demand No. 18 supplied appellant with a bill of particulars which read in part as follows:

> "Defendant devised the scheme and artifice set forth in each count of the indictment on or about October 1, 1927, provided he did not enter into negotiations with Guy W. Slack for the purchase of the land described in the indictment on or before that date" (Trans. p. 23).

The indictment as amplified by the proceedings on motion for a bill of particulars and the bill of particulars furnished by the Government alleges that the various letters set forth in the indictment were mailed in furtherance of and for the purpose of executing the alleged scheme and artifice *as such scheme and artifice was found by the Grand Jury and by it set forth in the indictment.* The Grand Jury having designated the particular elements going to make up the alleged scheme to defraud has set forth as a constituent and necessary part of said scheme those matters relating to the "Ten Way to Win Syndicate" and the fact that defendant would not exercise the option to purchase the land in Cimarron County, Oklahoma, nor obtain title to any part thereof.

These matters having been set forth as substantial parts of the scheme to defraud cannot be disregarded either by the trial Court or by the jury and that the failure to prove such matters constitutes a failure to prove the scheme as charged in the indictment. It must first be remembered that Section 215 of the Criminal Code (18 U. S. C. A. p. 134, sec. 338) does not define what acts shall constitute any scheme or artifice to defraud or for obtaining money or property by false pretenses. Neither is there any other provision in the laws of the United States defining what acts shall constitute such a scheme. *It is thus left to the Grand Jury to determine what acts do or do not constitute such a scheme or artifice and the opinion and judgment of the Grand Jury in this behalf cannot be overridden, altered or varied from by any Court or prosecuting officer.*

In *United States v. Hess*, 124 U. S. 483; 31 L. Ed. 516, the indictment, which was for a violation of Section 215 of the Criminal Code then known as 5480 of the Revised Statutes, merely alleged that the defendant had devised a scheme to defraud without setting forth the particulars of such scheme. In holding such pleading insufficient the Supreme Court said:

> "The object of the indictment is: first, to furnish the accused with such a description of the charge against him as will enable him to make his defense. * * * and second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these

must be set forth in the indictment with reasonable particularity of time, place and circumstances" (124 U. S. 487; 31 L. Ed. 518).

The Supreme Court then, in the last paragraph of its opinion, holds that the particulars of the scheme are matters of substance:

"Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict" (124 U. S. 489; 31 L. Ed. 518).

The rule that the particulars of the scheme are matters of substance has also been announced by the Circuit Court of Appeals for the Eighth Circuit, supported by ample authority as follows:

"Nevertheless, the particulars of the scheme are matters of substance, and must be set out with sufficient certainty to show its existence and character, and to fairly acquaint the accused with what he is required to meet. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89, 94; Miller v. United States, 133 Fed. 337, 66 C. C. A. 399."

Brooks v. United States, 146 Fed. 223, 227 (C. C. A. 8).

If the particulars of the scheme as set forth by the Grand Jury constitute matters of substance then they are vital to the charge and proof thereof is necessary.

The rule, in cases involving a violation of Section 215 of the Criminal Code, is that the scheme as alleged in the indictment must be proved before a

conviction for mailing a letter in furtherance thereof can be sustained:

> "The purpose of requiring a description of the scheme to defraud in the indictment is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense. Brooks v. United States (C. C. A.) 146 Fed. 223, decided at this term, and not yet officially reported; Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89, 94; United States v. Hess, 124 U. S. 483, 486, 8 Sup. Ct. 571, 31 L. Ed. 516.
>
> "It follows that one must be convicted, if at all on the scheme as alleged, and if the scheme as alleged is not substantially established by the proof he cannot be convicted."
>
> *Brown v. United States*, 146 Fed. 219, 220 (C. C. A. 8).

Each paragraph of the indictment which we have printed in italics above commences with the phrase, "It was further a part of said scheme and artifice," thus putting at rest any question of whether the Grand Jury intended these particular paragraphs to be construed as a means merely of carrying into effect any scheme or artifice devised by appellant or whether they intended the matter set forth in these paragraphs to be construed as indispensable parts of the scheme or artifice itself. Clearly, the Grand Jury set forth these particular facts as constituting essential and component parts of the scheme and thus required the Government to establish these allegations by competent proof. The Grand Jury does not allege that these allegations were as to matters done or to be

done by defendant in furtherance of some scheme set forth in the indictment but specifically states that these allegations were a part of the scheme itself.

As there is not one word of testimony anywhere in the record relative to any "Ten Way to Win Syndicate" or as to any statements or representations made or to be made by petitioner relative thereto or any literature containing any reference thereto it follows that there is a total failure to prove the scheme as found by the Grand Jury and specifically set forth in the indictment.

This brings us to a discussion of how far the allegations of an indictment are binding upon the trial Court and the prosecution and as to what portions of an indictment can be rejected and a conviction on the remaining part sustained.

The lower Court and the prosecution were evidently of the opinion that where an indictment alleges a scheme to defraud composed of several elements, which a Grand Jury has solemnly incorporated therein, certain of these elements can be rejected and disregarded, but such is not the law. Nothing can be disregarded which is set forth in an indictment except those matters therein which constitute surplusage. If it be surplusage proof thereof is not necessary. If it be not surplusage the allegation becomes material to the charge and must be proven.

As to what constitutes surplusage the rule, which has been invariably followed, is laid down in the case of *U. S. v. Sauer*, 26 Fed. Cases 388, case No. 15403, where Mr. Justice Story in delivering the opinion of

"There are, however, some principles which will guide us in arriving at a correct conclusion, and as these principles will be found to be well laid down by Mr. Russell in his work on Crimes and Misdemeanors, with illustrative examples, I shall state them from this work, because I find them confirmed by the authorities cited by him. 'Two questions generally arise. The first is, What allegations must be proven and what may be disregarded in evidence? The second is, What is sufficient proof of allegations which cannot be disregarded in evidence? The former includes the consideration of what constitutes mere surplusage in an indictment; the latter what properly constitutes variance. Mere surplusage will not vitiate an indictment and need not be established in proof. *The material parts which constitute the offense charged must be stated in the indictment, and they must be proved in evidence.* Allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant and without detriment to the indictment, are considered as mere surplusage and may be disregarded in evidence. *But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage.*'"

Applying the rule laid down in the foregoing case we find that the Grand Jury has set forth specifically what they consider to be the necessary elements of this charge. Appellant was not being tried on what the United States Attorney thought the charge consisted of nor on what the trial Court believed was

sufficient to justify the infliction of some punishment upon him. He was being tried under the Fifth Amendment of the Constitution of the United States, that is, upon an indictment which contained what the Grand Jury determined the elements of the offense to be. The Grand Jury has said that the allegations relating to the "Ten Way to Win Syndicate" were a vital, necessary part of the scheme. These are allegations descriptive of the identity of the offense—an offense the elements of which can only be determined by the Grand Jury and for which we cannot resort to any law or statute of the United States. The Grand Jury having seen fit to denominate these allegations as essential elements of the scheme they do not constitute surplusage; they cannot be rejected and they must be proven by the Government. They are "descriptive of the identity of that which is legally essential to the charge" (*U. S. v. Sauer*, supra) because without the statement of the particular facts constituting the alleged scheme no offense can be stated (*U. S. v. Hess*, 124 U. S. 483; 31 L. Ed. 516, 517).

The question to be determined in all these matters is not whether the lower Court or prosecuting officer believes that some person has committed a crime and would have been indicted whether certain facts were or were not presented to the Grand Jury but what are the material facts which the Grand Jury considered essential to the indictment of such person. As our Supreme Court has said, in all probability the Grand Jury may never have returned this indictment or may have refused to indict if the evidence of the

"Ten Way to Win Syndicate" matters had not been presented to it.

In the late case of *Naftzger v. U. S.*, 200 Fed. 494, (C. C. A. 8), the defendant was charged with the offense of buying stamps that had been stolen from the Government. The indictment alleged that the stamps which were bought by the defendant were stolen from certain post offices in the State of Kansas. The proof did not show the stamps to have been stolen from post offices in the State of Kansas. The defendant was convicted and the matter taken to the Circuit Court of Appeals. In reversing the conviction the Circuit Court of Appeals said:

> "Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but having been allowed, *the evidence must conform to and support the allegation.* The return of an indictment is the work of the grand jury only—a co-ordinate branch of the court. *It is for that body, and for no other officer, to say what shall and what shall not be charged*, because the fifth amendment to the constitution declares that: 'No person shall be held to answer * * * for an infamous crime, unless on a presentment or indictment of a grand jury.'
>
> "In effect the government now insists on amending the indictment by striking out the words 'from various post offices in the state of Kansas.' That was what was in fact done in

> the case of ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, a case against a national bank officer for falsifying the books with intent to deceive the United States, depositors, and others, 'and the Comptroller of the Currency.' The words 'Comptroller of the Currency' need not have been alleged. Those words on motion of the United States attorney were stricken out by the court as surplusage. After conviction the Supreme Court, in habeas corpus proceedings, held the judgment to be void. It was conceded that there was no necessity to allege that the Comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from whersoever stolen from the government."
>
> *Naftzger v. U. S.*, 200 Fed. 494, 496 (C. C. A. 8).

The Court then goes on to state that it being alleged in the indictment that the stamps were stolen in the State of Kansas such fact could not be disregarded and had to be proved even though the indictment would still have charged an offense and been good had such allegation been omitted.

In the case of *Ex parte Bain*, 121 U. S. 1, 30 L. Ed. 849, the Supreme Court of the United States has laid down in unmistakable terms the lack of power of a trial judge or any other person or body to disregard any material matters included in the indictment by a Grand Jury. In the case of *Ex parte Bain* the defendant was charged by an indictment with doing certain things as a bank officer for the purpose of defrauding certain people and the Comptroller of the Currency. The trial Court did not deem it necessary for the Government to prove that these things

were done for the purpose of defrauding the Comptroller of the Currency and permitted the indictment to be amended by striking out these words. In dealing with the right of a trial judge to substitute its judgment for that of a Grand Jury the Supreme Court said (emphasis ours):

> "The learned judge who presided in the circuit court, at the time the change was made in this indictment, says that the court allowed the words 'Comptroller of the Currency and' to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests on the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. *The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument.* While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which

was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the grand jury? *If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."*

Ex parte Bain, 121 U. S. 1, 9; 30 L. Ed. 849-852.

Thus, in the case at bar, how could the lower Court or any one else say that there may not have been more than one of the Grand Jurors who found the indictment who was satisfied that the matters relating to the "Ten Way to Win Syndicate" were the only things which constituted the scheme a fraudulent one? And how can it be said that if the matters relating to the "Ten Way to Win Syndicate" had not been

presented to the Grand Jurors they would still have found and presented this indictment? It is entirely probable that if the matter relative to the "Ten Way to Win Syndicate" had not been presented to the Grand Jury it would have refused to indict or found that the remaining matters did not constitute a fraudulent scheme.

It is rather remarkable, in view of the ultimate disposition made of this case, that the trial judge construed the allegations as to the "Ten Way to Win Syndicate" as being integral parts of the alleged scheme to defraud. This is evident from the following facts:

The Government called a witness named Brubaker who testified on his direct examination to a conversation he had with petitioner on May 23, 1927, relative to the so-called "Ten Way to Win Syndicate" (Trans. 130). Subsequently petitioner moved the Court to strike out all of this testimony as to the "Ten Way to Win Syndicate" on the ground that there was no evidence connecting it back to January 17, 1927, when the alleged scheme is charged to have been formulated. The Court struck out this testimony and in doing so construed the indictment in identically the same manner as petitioner has herein. This is manifested by the language of the trial Court in striking out the testimony which language is as follows:

> "That testimony (of the 'Ten Way to Win Syndicate') may possibly be admissible as tending to show the means by which the alleged original scheme was carried out, *but the indictment alleges that it was a part of the alleged*

original scheme, while the testimony in my judgment, does not so show" (emphasis ours; Trans. 148).

It therefore follows that defendant was not convicted upon an indictment as found by the Grand Jury but was convicted for formulating a scheme and mailing a letter in furtherance thereof entirely different from the scheme as found by the Grand Jury.

The language of the Circuit Court of Appeals in affirming the conviction is directly contrary to the prior decisions of this Court and of the Circuit Courts of Appeal from other circuits as we have set forth such decisions hereinabove.

The Circuit Court of Appeals entirely lost sight of what the scheme to defraud as found by the Grand Jury consisted and in furtherance of which the letters were alleged to have been mailed. The Grand Jury did not charge that the letters were mailed in furtherance of a scheme formulated by Alford to procure an option on the land in Oklahoma and sell it without exercising the option. The Grand Jury has specifically charged that these letters were mailed in furtherance of a scheme the essential elements of which were that appellant should procure these options, sell land thereunder and then, for the purpose of defrauding his purchasers, attempt to transfer them into a new project denominated the "Ten Way to Win Syndicate." It was in furtherance of a scheme to transfer the purchasers of land into the "Ten Way to Win Syndicate" that the letters are alleged to have been mailed and not merely for the purpose of having

the purchasers buy land for which Alford never intended to give them a deed.

That such was the scheme as found and charged by the Grand Jury is apparent from a reading of the indictment and conclusively established by the fact that each of the letters set forth in the various counts thereof were written and dated no earlier than May 18, 1927, after the expiration of the option, after the cessation of sales by Alford, and addressed to people who had already agreed to purchase and partially paid for some of the land.

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2. **PETITIONER WAS PREJUDICED BY THE CURTAILMENT OF THE CROSS-EXAMINATION OF THE WITNESS BRADLEY AND THE MAJORITY OPINION THEREON IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF CIRCUIT COURTS FROM OTHER DISTRICTS AND FROM THE SUPREME COURT AND IS AGAINST THE WEIGHT OF AUTHORITY.**

One Cameron Bradley was produced as a witness on the part of the Government. His testimony covers 38 pages of the record and will be found in the Transcript from pages 176 to 209 and from 373 to 375. His testimony was of a most damaging character to the appellant. He identified documents and testified to statements alleged to have been made by petitioner, which petitioner denied ever having seen or made. He testified to many other things the prejudicial character of which can be ascertained by a cursory inspection of his testimony.

On cross-examination petitioner sought to ascertain the then address of this witness and whether he then

lived in Los Angeles (Trans. p. 194). The Court sustained objections to this inquiry. Petitioner maintained his right to elicit the address and business of the witness and to disclose to the jury just who the witness was (Trans. p. 194). Petitioner further maintained that he was informed the witness was then in the custody of the Federal authorities and had a right to question him upon this in order to show his bias or prejudice (Trans. p. 198). The Court refused to permit such cross-examination on the objections of the Government.

This ruling of the Court was most prejudicial to petitioner. The credibility of the witness was a matter to be passed upon by the jury. Whether he was in custody and his testimony influenced thereby was a matter the jury had a right to consider and the petitioner to elicit on cross-examination. Such fact alone may have warranted and justified the jury in disbelieving his testimony. What his then address was and whether he lived in Los Angeles became important for two reasons: first, that the place he was living in or at may have thrown some light on his character or might have developed that he was living with some one of the Government's witnesses or some one connected with the prosecution; second, that his place of residence may have enabled petitioner to produce witnesses as to his bad reputation for truth, honesty and integrity and depriving appellant of this information deprived him of this right.

A common way to impeach a witness is to show that his reputation, in the community in which he lives, for truth, honesty or integrity is bad and such is the law of California:

> "A witness may be impeached by the party against whom he was called * * * by evidence that his general reputation for truth, honesty or integrity is bad. * * *"
>
> *Cal. Code Civil Procedure*, sec. 2051.

But how can one so impeach an adverse witness if the right and opportunity to ascertain where he lives is denied him?

Circuit Judge Dietrich, in his dissenting opinion (Trans. p. 503) has fully and accurately summarized the law on this point and agreed with petitioner's contention. The rules announced by him are in accord with the authorities from practically every jurisdiction within the United States as we will now demonstrate.

The Circuit Court of Appeals in the majority opinion decided this point against petitioner's contention upon grounds each of which are against the weight of authority in this country. These grounds are as follows:

1. That collateral information cannot be elicited on cross-examination for the purpose of discrediting a witness.

2. That a witness is entitled to be protected on cross-examination from evidence tending to discredit him.

3. That a witness is not on trial.

4. That appellant failed to avow that Bradley was testifying under some promise of immunity.

5. That the proposed question was merely in pursuit of a fishing expedition by which appellant hoped to discredit the witness.

A review of all the authorities in this country discloses that the foregoing reasons are erroneous. While it is true a witness is not on trial in the sense that any judgment can be rendered for or against him in the action, it is likewise true that a witness is on trial so far as his character, reputation, integrity, credibility, powers of observation and ability to relate are concerned, and the jurors are the exclusive judges of these matters. Every witness is presumed to speak the truth; but this is a rebuttable presumption which the adverse party has a right, either by independent testimony or on cross-examination, to destroy. If such were not the case men utterly unworthy of belief would be placed, in our Courts of justice, upon the same level with men of unimpeachable integrity and credibility.

One of the main purposes of cross-examination is to test and, if the circumstances warrant it, to destroy the credibility of a witness. This is done by discrediting the witness. A reference to a few reported cases on this subject we think will suffice:

The Supreme Court of the United States has laid down the rule as follows:

> "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection, and as a means of ascertaining the order of the

events as narrated by the witness in his examination in chief; and the time and place when and where they occurred, and the attending circumstances: and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness."

The Ottawa v. Stewart, 70 U. S. 165; 18 L. Ed. 165, 167.

Jones in his Commentary on the Law of Evidence (2nd Ed.), volume 5, section 2345, announces the rule as follows:

"The party who produces a witness vouches for his credibility, but the cross-examiner sustains no such relation to the witness and has full liberty to test his credibility. For the purpose of testing the credibility of a witness it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclinations and his prejudices."

Further on in the same section this learned writer states:

"It is said that a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosynerasies may be relevant."

In 28 *R. C. L.*, page 607, section 197, the purposes for which cross-examination are permitted are fully set forth supported by abundant authority in the footnotes thereto. This section reads as follows:

"A question will not as a rule be allowed on cross-examination which is obviously irrelevant, but a witness may be cross examined as to matters irrelevant to the issue, in order to discredit his testimony by what he himself may state in answer although not for the purpose of contradicting him by another witness. This is true regardless of the rule prevailing with respect to the scope of cross examination as to matters directly material to the issue. Although as to these matters the cross examination cannot extend beyond the range of the direct examination, yet the fullest inquiry must be allowed into collateral matters, whether they have been the subject of direct examination or not. In fact, this line of inquiry is one of the most important purposes of cross examination and is the principal factor in establishing cross examination as one of the chief agencies for the development of the truth in judicial inquiries. By means thereof the relation of the witness to the cause or the parties, his bias or interest, if he has any, his character for truth and veracity, indeed any collateral fact which may bear on his truthfulness and impartiality may be brought to light. *Any question may be put which reasonably tends to explain, contradict, or discredit any testimony given by him, or to test his accuracy, memory, veracity, or credibility.* Cross examination with a view to direct impeachment is not the limit of the right" (italics ours).

The Supreme Court of California has held that the object of cross-examination is to test the credibility of a witness:

"The object of cross-examination is to test the credibility, knowledge and recollection of a wit-

ness as to his testimony on direct examination (Greenl. Ev., sec. 446)."

Sharp v. Hoffman, 79 Cal. 402, 408;

People v. Hart, 153 Cal. 261, 267.

In 40 *Cyc.* page 2563, sec. 6, it is stated that:

"* * * it has been laid down that there are but four modes of impeaching the credit of a witness: (1) by cross-examination; * * *"

Further on in the same work we find the following language:

"On cross-examination it is permissible to ask a witness questions for the purpose of testing his reliability and affecting his credit and for this purpose great latitude is allowed."

40 *Cyc.* p. 2564.

The foregoing authorities could be many times multiplied but we believe that they sufficiently establish the right to attack the credibility of a witness on cross-examination. In dealing with what matters may be gone into on such a cross-examination we will hereafter set forth additional cases which support the foregoing doctrine.

It being proper to attack the credibility of a witness on cross-examination the next query is: to what subjects may such a cross-examination relate? The answer is that it can relate to any subject which bears upon the character, morals, occupation, associates, integrity or credibility of the witness. Such cross-examination need not be confined to the points and issues in the case or to the matters touched upon in the witness's direct examination. This purpose is

likewise firmly established by the authorities a very few of which we will quote from:

"By the great weight of authority it has always been permissible upon cross examination to inquire into the antecedents of a witness by showing his occupation, social connections, manner and place of living, and the like. Being matters largely of his own choice, they indicate his true character. He is therefore responsible for them, and they may be inquired into for the purpose of affecting his credibility. This is useful in enabling the Court or Jury to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. If he has been voluntarily engaged in any occupation which would tend to impair his credibility, the Jury is entitled to that information. The fact that he has gone under an assumed name may be inquired into on cross examination, and, since it is always proper to ask a witness as to his place of residence, he may be required to answer though his answer will show that he is in jail."

28 *R. C. L.* p. 610, sec. 199.

"* * * a witness may be cross examined as to matter irrelevant to the issue in order to discredit his testimony by what he himself may state in answer although not for the purpose of contradicting him by another witness. This is true regardless of the rule prevailing with respect to the scope of cross examination as to matters directly material to the issue."

28 *R. C. L.* p. 607, sec. 197.

"Matters brought out on cross-examination, which are legitimate for the purpose of enabling the Jury to determine the credibility of a witness,

are not objectionable, although they may relate to questions not in issue in the case."

Vindicator, etc. Mining Co. v. Firstbrook, 86 Pac. (Colo.) 313, 314.

The reasons supporting the right to ask such questions on cross-examination have been summed up as follows:

"* * * it is always competent to interrogate a witness on cross-examination touching his present or recent residence, occupation, and associations. * * * When (these facts are) disclosed on cross-examination it is exclusively for the jury to determine whether any truth can come from such source, and, if so, how much."

Hollingsworth v. State, 14 S. W. (Ark.) 41, 42.

"At first these questions might seem open to the objection of being collateral and irrelevant, and for that reason not permissible, even under the latitude given on cross-examination. Yet, for the purpose of showing the character of the witness, and the degree of credit to be given to his testimony, we think they were proper. These were matters of the highest importance to the jury, who from the testimony were to determine the guilt or innocence of the defendant. For these purposes, questions tending to show the present or recent places of residence, occupation, association and acquaintances of the witness, of his own choice cannot be considered as irrelevant."

Kirschner v. State, 9 Wis. 140.

Up to the time Bradley was called as a witness the Government had elicited from each of its other witnesses his or her address. This was not done of Brad-

ley. Why did the United States Attorney object to this particular witness telling where he lived? Was it because he knew the answer would injure the witness before the jury and impair his credibility? Undoubtedly so.

When the attorney for appellant told the Court he had information to the effect that Bradley was then in the custody of the Federal authorities, why did not the United States Attorney deny this? He made no such denial (Trans. p. 198). If the statement of appellant's attorney in this regard was not true the Government's attorney undoubtedly would have stated the contrary to the Court.

If appellant had been allowed to pursue this most proper line of cross-examination this witness' credibility before the jury may have been completely destroyed and a different verdict returned.

The Supreme Court of the United States has recognized these rules in a case where a female witness was asked with whom she was then living and if she was not living with one other than her husband. Objections were sustained to these questions on the ground that they were immaterial and incompetent. The defendant was convicted and the Supreme Court promptly reversed the cause for failure to allow such questions to be answered. In doing so the Court said:

> "We think answers to all of these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his ex-

amination and obtain answers from the witness to that end."

Tia-Koo-Yel-Lee v. U. S., 167 U. S. 274, 42 L. Ed. 166, 167.

The Supreme Court in further commenting on this case stated:

"And in speaking of the refusal of the court to permit answers to be given to the questions asked, as above recited, counsel for the government also says in his brief:

" 'No reason is given for the exclusion of these questions beyond that reiterated in the objection, that they were 'incompetent, irrelevant and immaterial.'

"He frankly says that in his opinion this evidence was admissible, and we have no doubt that it was."

Tia-Koo-Yel-Lee v. U. S., supra.

In the case of *Furlong v. U. S.*, 10 Fed. (2nd) 492 (C. C. A. 8), two Government witnesses were asked on cross-examination whether they had not had trouble with the defendant and whether they did not entertain unfriendly feelings toward him. This line of examination was objected to by the Government and the objection sustained. The Circuit Court of Appeals for the Eighth Circuit said:

"This was clearly error. No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross-examination. His answers are not relevant to the issue, but they do throw a direct light on the credibility of his evidence."

Furlong v. U. S., 10 Fed. (2d) 492, 494 (C. C. A. 8).

The fact that a witness is in custody becomes most material in determining the credibility of such witness and as to whether or not the testimony of such witness is colored by a promise of favor or immunity or *by the mere hope or expectation of favor or immunity:*

> "The prosecuting witnesses, before the time of the trial, had pleaded guilty to an indictment in the federal court: the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. As bearing upon their credibility, motive for false accusations, a well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible: they are, however, rarely made. Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the revelant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himelf, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope.* The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.

"The trial judge, although at one time during the taking of testimony he had so ruled, later sustained the objection to similar testimony, and finally not only refused an instruction that the jury might consider the fact of the delayed sentence as bearing on such hope, but expressly instructed counsel that they must not argue the matter as affecting the motives of the witnesses.

"In our judgment, this was such error as to compel a reversal in the instant case. Stevens v. People, 215 Ill. 601, 74 N. E. 786; State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686" (italics ours).

Farkas v. U. S., 2 Fed. (2nd) 644, 647 (C. C. A. 6).

"It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant."

People v. Dillwood, 39 Pac. (Cal.) 438, 439.

It is always competent to inquire on cross-examination into the residence, occupation and antecedents of a witness for the purpose of testing and weakening the credibility of such witness. On this proposition the authorities are again voluminous:

"By the great weight of authority it has always been permissible upon cross-examination to inquire into the antecedents of a witness by

showing his occupation, social connections, manner and place of living, etc. Being matters largely of his own choice, they indicate his true character. He is therefore responsible for them, and they may be inquired into for the purpose of affecting his credibility. State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; Musgraves v. State, 3 Okla. Crim. Rep. 421, 106 Pac. 544; Hendrix v. State, 4 Okla. Crim. Rep. 611, 113 Pac. 244; Crawford v. Ferguson, 5 Okla. Crim. Rep. 377, 45 L. R. A. (N. S.) 519, 115 Pac. 278; Fowler v. State, 8 Okla. Crim. Rep. 130, 126 Pac. 831; Burdette v. Com., 93 Ky. 76, 18 S. W. 1011; Leslie v. Com., 19 Ky. L. Rep. 1201, 42 S. W. 1095."

State v. Fong Loon, 158 Pac. (Idaho) 233; L. R. A. 1916F, 1198, 1202.

"As to one class of inquiry tending to degrade or debase a witness the courts are in comparative agreement. The right to inquire of a witness as to his occupation or residence for the purpose of discrediting him is generally recognized. As the Kentucky court points out, there seems to be no good reason why a witness should be privileged from answering a question touching his present situation, employment, and associates, if they are of his own choice; as, for example, in what house or family he resides; what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons and the like. Although such questions may tend to disgrace him, his position in such regards is of his own seeking.

It is well settled on direct examination that a witness may be questioned as to his occupation, residence, and so forth, for the purpose of putting the jury in possession of those general facts

which are of the witness' own choosing and which all men instinctively consider in weighing the word of a person to them unknown."

Jones on Evidence (2nd Ed.), Volume 5, p. 4642.

"Counsel for the state did not ask the witness if he was engaged in gambling or conducting a gambling place. It was eminently proper, under the facts of this particular case, to have asked the witness upon cross-examination not only if the basement of the Chinese temple in which he resided was used on the night of the homicide as a gambling place, but what, if any, occupation he was following at the time in connection with such gambling resort, if he answered in the affirmative. This question was not asked for the purpose of impeachment as provided for under sec. 6082, Rev. Codes, or to establish the commission of a particular wrongful act, but for the express purpose of showing the business, occupation, manner, and place of living of the witness; and it is an elementary rule of evidence that such information may be elicited upon cross-examination. Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41; Wallace v. State, 41 Fla. 547, 26 So. 713; State v. Ward, 49 Conn. 429."

State v. Fong Loon, 158 Pac. (Idaho) 233; L. R. A. 1916F, 1198, 1201.

The majority opinion states that these questions were asked of the witness Bradley for the purpose of discrediting the witness. As we have demonstrated the very purpose of cross-examination is to discredit the witness. It may be well to again call the Court's attention to the majority opinion (Trans. p. 499)

where it is clearly pointed out that appellant sought to elicit this information for the purpose of showing the bias or prejudice of Bradley.

The majority opinion expresses the view that evidence tending to disgrace or discredit the witness should be excluded by the trial Court. While it is true that the constitution of the United States protects a witness from self-incrimination further than this it does not go. Even where an answer might incriminate or tend to incriminate a witness the same must be answered *unless the witness personally claims his protection.* Anything short of self-incrimination does not fall within the protection of the constitution and a witness may be required to answer even though such answer may tend to disgrace him.

> "The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. *It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him; but the line is drawn at testimony that may expose him to prosecution.* If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply" (italics ours).

Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652, 662;

Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819, 821.

To the same effect are the following authorities:

Jones on Evidence (2nd Ed.), Vol. 5, p. 4642, supra;

State v. Pancoast, 35 L. R. A. 518; 67 N. W. 1052;

40 *Cyc.* p. 2615;

Zanone v. State, 35 L. R. A. 556, 36 S. W. 711.

From a reading of all the foregoing authorities it is thus manifest that the failure of the trial judge to allow the cross-examination of Bradley constitutes reversible error. It was not necessary to show that Bradley had been convicted of a crime but it was only necessary to show that he was then in a position with respect to the Federal authorities which would tend to color any testimony he was then giving in the hope or for the purpose of procuring favorable treatment or consideration from the Government. As his was the most important testimony produced by the prosecution the Jury had a right to know his occupation, place of residence, associates and surrounding circumstances in order to properly judge his credibility. These facts could be elicited on cross-examination.

A party is not charged with any knowledge as to things which are personal to a witness produced by the other side. A defendant cannot be presumed to know the place of residence, occupation, associates or antecedents of a witness produced by the Government. He acquires this information for the first time on cross-examination of the witness. The answers elicited may not affect the witness' credibility and then again they may seriously destroy the effect of

such witness' testimony (see *People v. Stevenson*, 79 Cal. Dec. 141). This must be true because the rule is that on cross-examination counsel need not state what he expects to elicit from the witness.

40 *Cyc.* p. 2049;

Hyland v. Milliner, 99 Ind. 308.

While petitioner herein cannot be charged with any knowledge of what Bradley's responses would be to the questions, nevertheless he informed the Court that he had been informed that Bradley was then in the custody of the Federal authorities and that such fact was pertinent as to the question of the witness' credibility, bias or prejudice. The Government did not then and has not as yet denied that Bradley was under arrest or in custody and again we state that no other conclusion can be based upon these entire proceedings than that the Government prevented such questions from being answered knowing that the answers would destroy the credibility of the witness.

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3. **THAT PORTION OF THE MAJORITY OPINION WHICH UPHOLDS THE REFUSAL OF THE TRIAL COURT TO GIVE PETITIONER'S REQUESTED INSTRUCTION NO. 10 IS IN DIRECT CONFLICT WITH PRIOR DECISIONS ON THE SAME POINT OF THE SUPREME COURT AND OF CIRCUIT COURTS OF APPEAL OF OTHER CIRCUITS.**

The trial Court's oral instructions to the jury will be found set forth in full in the transcript from pages 379 to 398.

Among others, the petitioner requested an instruction marked "Defendant's Requested Instruction No. 10," which is set forth at page 401 of the transcript.

The second paragraph of this requested instruction reads as follows:

> "If you find that any promises made by the defendant were not fulfilled by him or that any representations as to future events did not occur as represented this, in and of itself, is not sufficient to establish the fact that the defendant did not intend to fulfill such promise or that he knew such representation to be false. In addition to the proof that such promise was not kept or that such representation was not fulfilled there must be evidence to establish the fact that the defendant knew at the time of making such promise or representation that it would not be fulfilled" (Trans. p. 401).

The foregoing instruction was one pertinent and necessary to petitioner's defense. There was evidence in the record to show that he never gave any deeds to the land he sold; that he never started the digging of any oil wells and that he never exercised all of his option or acquired title to all of the land described in the indictment. But, petitioner was not on trial for failure to do any of these things. He was on trial for mailing certain letters in furtherance of a scheme to defraud, an integral portion of which scheme consisted of certain alleged promises and representations *which at the time he made them he had no intention of fulfilling.* His defense was, in part, that any promises or representations made by him were made in good faith and with intent of performing the same. It was incumbent on the Government to prove that any such promises or representations were made with a knowledge and intent, *at the*

time of the making thereof, that they would not be fulfilled, and mere proof of their non-fulfillment or non-performance was insufficient to establish this knowledge or intent.

> "But if the Government were to prove beyond a reasonable doubt that she did not so use her thought, this would not meet the requirement of the indictments. *It must prove* not only that she did not administer this invisible and intangible treatment, but *that she did not intend to administer it*" (italics ours).
>
> *Post v. U. S.*, 135 Fed. 1, 6 (C. C. A. 5).

The majority opinion disposes of the refusal to give this instruction as follows:

> "As to instruction No. 10 referred to on page 72 of appellant's brief, the court did give substantially this instruction. The requested instruction states that the evidence must establish the fact that the defendant knew at the time of making such promise or representation that it would not be fulfilled, whereas the court properly instructed the jury that, if when the promise was made the defendant had no intention of performing, such promise was fraudulent" (Trans. p. 502).

In so disposing of this matter the majority opinion completely ignores the fundamental rule that a defendant in a criminal case is entitled to have the jury specifically instructed on all questions of law applicable to his defense or defenses. To tell the jury that a fraudulent promise is one made without intent of performing it is entirely different from

telling the jury that mere proof of nonperformance does not establish the fraudulent character of a promise.

The majority opinion is directly opposed to the prior decisions on this subject and ignores the right of a defendant to have his side of the case as fully presented to the jury, in the Court's instructions, as the side of the prosecution:

> "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. Bird v. United States, 180 U. S. 356, 361, 21 Sup. Ct. 403, 45 L. Ed. 570; Hendrey v. United States, 233 Fed. 5, 18, 147 C. C. A. 75; Liner v. State, 124 Ala. 1, 7, 27 South. 438; Banks v. State, 89 Ga. 75, 14 S. E. 927. We think the court erred in refusing to charge the jury as to the defendant's theory of the case, and that such error requires a reversal of the judgment of conviction of the plaintiff in error."
>
> *Calderon v. U. S.*, 279 Fed. 556, 558 (C. C. A. 5).

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 3, sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the rela-

tions of the particular evidence adduced to the particular issues involved."

Bird v. U. S., 180 U. S. 356, 361; 45 L. Ed. 570, 573.

"* * * the respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it. We cannot avoid the conviction that the respondents' rights in these respects in this case were not sufficiently saved by the general charge."

Hendry v. U. S., 233 Fed. 5, 18 (C. C. A. 6); *Carney v. U. S.*, 283 Fed. 398 (C. C. A. 8).

All of the foregoing cases were promptly reversed for failure to give a specific requested instruction as to the law applicable to one of defendant's defenses.

"Where there is evidence to support any defense offered by accused, which raises an issue of fact favorable to him, the court should present the issue by an affirmative instruction which fairly and fully declares the law applicable thereto, including the defining or explaining of the elements of the defense. A negative presentation of an issue favorable to defendant is not sufficient."

16 *Corpus Juris*, p. 971, sec. 2369.

"As a general rule, whether requested or not, the court should instruct on every essential question in the case so as to properly advise the jury of the issues. The court should submit every question suggested by the evidence, whether of-

fered by the prosecution or by the accused, or by both."

16 *Corpus Juris*, p. 963, sec. 2354.

"It is proper for, and generally the duty of, the court to state correctly in the charge both the claims made by the prosecution and those made by the defendant. * * * A theory presented solely by the statement of accused should be charged where a proper request therefor is made *and such charge should give the law fully and fairly both for the prosecution and for accused.*"

16 *Corpus Juris*, p. 964, sec. 2356.

The foregoing decisions and authorities lay down the invariable rule that it is reversible error not to fully charge upon any defense advanced by defendant. The defendant in this case advanced the defense that there were no promises or representations made by him which, at the time of making, he did not intend to fulfill. It became the duty of the trial judge to instruct the Jury fully on this phase of appellant's defense. Merely to tell the Jury that a promise was fraudulent if, when made, the defendant had no intention of performing it is but to instruct the Jury partially upon the law of this particular matter. The appellant was entitled to have the trial judge instruct on all phases of this question and to tell the Jury, especially when requested by appellant, what facts were insufficient to establish a fraudulent promise. In other words appellant had the undoubted right to have the Jury instructed that mere proof that a promise was not fulfilled in and of itself failed

to establish that such promise was made without intent of fulfilling it. In the absence of such requested instruction the Jury, under the charge as given, could and undoubtedly did find that because promises had been made and not kept by appellant, such fact established that appellant made them without any intent of fulfilling such promises.

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4. **THE MAJORITY OPINION RELATIVE TO THE INSTRUCTIONS AS GIVEN BY THE TRIAL COURT TO THE JURY IS IN CONFLICT WITH THE WEIGHT OF AUTHORITY.**

The Court instructed the jury as follows:

> "If the defendant intended to and did devise the scheme or artifice, as alleged, *and did make false and fraudulent representations and assurances for the purpose of deceiving persons with respect to his ownership of the land in Cimarron County, Oklahoma*, and of obtaining money by means of such false representations and pretenses, and for the purpose of executing such scheme, or attempting so to do, did place or cause to be placed the letters set forth in the several counts of the indictment in any post office or mail box of the United States in Los Angeles County, California, to be sent or delivered by the post office establishment of the United States, as alleged, then a subsequent ultimate intent to reimburse the investor or investors would by no means furnish a condonation or legal excuse for the false representations. It may, however, be considered by the jury in connection with all the other evidence in the case in determining whether or not such representations, if made, were made with the intent to defraud as charged" (italics ours).

(Trans. p. 386).

To this instruction appellant duly excepted (Trans. p. 400) on the grounds that the instruction specified a false representation as to the ownership of land in Cimarron County. A reading of the indictment discloses that it was not alleged that defendant intended to or did make any false or fraudulent representations with respect to his ownership of land in Cimarron County, or of using such false or fraudulent representations for the purpose of executing the scheme or attempting so to do, or for deceiving any persons whatsoever. The indictment contains no reference to any false representations as to defendant's ownership of land either as an element of the alleged scheme to defraud or as a means of carrying it into effect and the majority opinion so finds (Trans. p. 502).

The foregoing portion of the Court's charge in effect tells the jury that such representations as to defendant's ownership of the land constituted a part of the alleged scheme to defraud. It further instilled into the jurors' minds the proposition that they could and should find the defendant guilty if they found that he made false statements and representations as to his ownership of this land.

This instruction was undoubtedly prejudicial to the defendant. Many witnesses testified in the cause as to the fact that defendant had stated he was only selling the land he owned and had paid for (see testimony of purchasers: Mrs. Stromberg, p. 150; J. R. Gordon, p. 154; G. R. McNeil, p. 161; F. Gunderlach, p. 162; P. Doring, p. 168; Ellen Hancock, p. 210; see also testimony of salesmen: Brubaker, p. 127; Bradley, p. 178; Sonia West, p. 269, etc.).

With all of this testimony before the jury the Court's instruction could have had no other effect than impressing the jurors with the fact that such representations constituted an important part of the scheme, which, if false, were sufficient to justify a finding that Alford had devised a fraudulent scheme.

The majority opinion (Trans. p. 502), while admitting there is no allegation in the indictment that it was part of the scheme that defendant should misrepresent his title, attempts to uphold the instruction on the ground that the Court instructed the jury "over and over that it was necessary to prove the allegation of the indictment beyond a reasonable doubt" and that "the allegations in the indictment concerning title were quoted in the instruction."

Circuit Judge Dietrich in his dissenting opinion (Trans. p. 505) says:

> "I further think * * * that there was error in giving an instruction in which reference was made to 'false and fraudulent representations and assurances for the purpose of deceiving persons with respect to defendant's ownership of the land,' for the reason that, as given, this instruction advised the jury that they should convict defendant for a fraud touching which evidence had been received but which was clearly beyond the scope of the charges as laid in the indictment."

This language in the dissenting opinion is in strict accord with petitioner's contention.

A Court in charging a jury should not give a confusing, conflicting or misleading instruction and to do so is reversible error.

No one can say which of the Court's instructions guided the jury and it can never be determined what effect a jury gave to any instruction given by a Court.

The only place in the instructions where the Court reads from the indictment at all is on page 388 of the transcript where the Jury is told that it was a part of the scheme that certain things should not be done. The Jury was instructed on July 31, 1929. The indictment was read to the Jury at the beginning of the trial on July 18, 1929, between which dates many witnesses testified. Under the charge as given by the Court, the instruction complained of caused the Jury to believe that as there were many misrepresentations made as to defendant's ownership of the land, this constituted part of the scheme to defraud. As there was testimony to this effect who can say but what the Jury considered this in and of itself sufficient to predicate a verdict of guilt upon?

Courts have always been careful to see that defendants in criminal cases are accorded fair and impartial trials and that Courts instruct the Juries fairly and without injecting false issues into the case.

In the case of *Bross v. U. S.*, 108 Fed. 804 (C. C. A. 4), the defendant had been convicted and his conviction affirmed by the Circuit Court of Appeals for the Fourth Circuit. A petition for a rehearing was filed whereupon the Circuit Court ordered a new trial solely upon the grounds that the trial judge in instructing the Jury as to one particular phase of the case said that in his opinion if certain facts were proven it was the duty of the Jury to convict. In this behalf the Court said:

"But, inasmuch as the strong opinion expressed by the judge below in his charge to the jury, in which he used the words 'that, in his opinion, it was the duty of the jury to convict the defendant,' was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the court, we think that it would be proper to grant a new trial. For these reasons the case is remanded to the court below, with instructions to grant a new trial."

The general rule is stated in *Corpus Juris* with authorities from many states as follows:

"An instruction, whether given by the court of its own motion or requested, is erroneous and should not be given where it is calculated to confuse or to mislead the jury; as where it requires explanation or qualification, or limits the freedom of the jury in considering the evidence or is ambiguous, obscure, uncertain, unintelligible, or meaningless."

16 *Corpus Juris*, 1036, sec. 2477.

That the charge taken as a whole is correct will not cure this error:

"It is urged by the prosecution in this case, as it was in the People v. Valencia, 43 Cal. 552, and the People v. Wong Ah Ngow, 54 id. 151, that the charge as a whole is correct; i. e., that the jury, after being told that insanity need only be proved by a preponderance of evidence, would necessarily infer that Lord Mansfield erred in saying that 'it must be proved beyond all doubt,' or rather, that the rule had been changed since his time. *What the jury did or did not infer can never be known. Viewed in the most favorable light, the tendency of the charge was to confuse*

the jury who, however intelligent, cannot be presumed to have been equal to the task of carefully discriminating between the views of Lord Mansfield and those of this Court, and of adopting the latter's in preference to the former's. This is the only exception which appears to have been well taken.

"Judgment and order denying a new trial reversed, and cause remanded for a new trial" (italics ours).

People v. Messersmith, 57 Cal. 575.

CONCLUSION.

We believe that the foregoing demonstrates that the majority opinion of the Circuit Court of Appeals should not be allowed to stand as a future guidance for the trial of criminal cases within the Ninth Circuit. Not only does the majority opinion announce erroneous rules of law but it does so in direct conflict with prior opinions of long standing on identically the same points.

If the rulings announced in the majority opinion are not set aside defendants on trial for criminal offenses within the Ninth Circuit will be deprived of the benefits of the provisions of the Fifth Amendment to our Constitution; their right of cross-examination of adverse witnesses, one of the most valuable rights a defendant has for the establishment of the truth, will be curtailed and abridged; defendants will be tried and convicted of offenses as formulated by trial judges and prosecuting attorneys and not as found by Grand Juries and they will be denied those fair and

impartial trials in accordance with our established rules of procedure as guaranteed by our Constitution, the laws and decisions of our Courts.

Dated, San Francisco,
August 11, 1930.

Respectfully submitted,
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